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Making effective objections to Local Plans

Hereward Phillpot QC

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Local Plan Objections: Strategic Overview

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Why bother?

- Importance of the development plan
 - *“The development plan sits at the heart of the planning system with a requirement set in law that planning decisions must be taken in line with the development plan unless material considerations indicate otherwise”* (PPG Plan-Making [001])
 - TCPA 1990 s. 70, PCPA 2004 s. 38(6)
 - NPPF [11.c], [12], [15]



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Why bother?

- Willingness of Local Plan Inspectors to reject plans and to require significant changes
- User-friendly process
 - Inquisitorial examinations, so good points can be picked up by the Inspector
 - Informal hearings



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Know your enemies, and your allies

- Who is driving the policy and why?
 - Councillors?
 - Officers?
- Which other parties might be able to help your case?
 - Key stakeholders (EA, NE, Highway Authorities, infrastructure providers etc.)
 - Disappointed developers
 - Neighbouring local authorities



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Clearly define a realistic objective

- Removal of a policy or allocation
 - What are the implications for the plan as a whole?
 - Is there a credible alternative to meeting identified need?
- Changing policy wording
 - Thinking ahead to the application(s)
 - Identifying alternative drafting that works



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Establishing a strategy at the outset

- Understanding the legal and policy context
 - The different legal and policy requirements to be satisfied at each stage (e.g. PCPA 2004 s. 33A duty to co-operate pre-submission; s.20(5) purpose of examination).
 - Tailoring your approach to different stages: preparation, consultation and examination
- Understanding (in detail) the strengths and weaknesses of the Council's evidence base at each stage.

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Focus your resources and efforts on the most promising issues and documents

- SA/SEA, including alternatives
- Duty to co-operate
- Habitats Regulations Assessment
- Deliverability (incl. infrastructure funding and viability)
- Transport modelling
- Chronology of decision-making and development of the evidence base (see e.g. PPG Plan-Making at [038]; Eastleigh Local Plan)

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Use counsel early and cost-effectively

- Establishing realistic objectives
- Determining an overall strategy and tactics for each stage
- Drafting or settling representations
- Providing Opinions for tactical use
- Oral advocacy at hearings
- Cost-effective use of leaders and juniors



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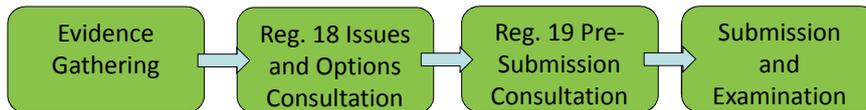
How to Participate Effectively: From Plan Preparation to the Examination

Caroline Daly



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The Process



- Up to the point of submission, the content of the Plan is prepared and controlled by the LPA
- After submission, the power lies with the Inspector – e.g. if I considers that Plan can be found sound with main modifications, LPA must adopt the Plan with the I's main modifications or not at all

Pre-Submission: Preparation and Consultation

- Understand the process – Reg. 18, Reg. 19 and NB the Statement of Community Involvement
- Participate at an early stage and keep up to date with the progress of the emerging Plan
- Remember that the audience is the LPA



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Pre-Submission: Preparation and Consultation

- Identify problems/issues and suggest constructive solutions
- Consider how the response will assist the overall strategy
- Consider deploying expert evidence in targeted manner e.g. scientific evidence to rebut HRA, transport evidence, viability evidence
- Make response focussed, useful and comprehensive

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The Examination: Preparation for the Hearings

- Ensure that you are up to date with the draft and any suggested modifications
- Prepare hearing statements that respond concisely to the MIQs. Introduce key new evidence as an appendix but only where it is important and material
- Understand the role of the Programme Officer
- Consider strategy for the Hearings and who will most effectively make the case – this may be different people for different sessions

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The Examination: At the Hearings

- Establish credibility – preparation is essential
- Listen to the Inspector
- Be concise – do not stray from your central points
- Collaborate with allies – decide in advance who will lead on an issue. This avoids repetition, makes better use of time and allows those with the strongest arguments to put them first
- Pay attention to ‘homework’ given to the LPA and ask to respond to it where appropriate
- Participate in any Main Modifications Consultation

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Challenging Local Plans

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Outline

- Thinking backwards. Anticipating bringing/defending legal challenge.
- Procedure
- Timing
- Remedy: What does success look like?
- Types of challenge likely to succeed
 - Substantive
 - Procedural



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Procedure

- Preclusive provision s.113 Planning and Compulsory Purchase Act 2004
- Follows CPR PD54E like other statutory challenges. Public law grounds only.



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Timing

- 6 weeks to challenge from the date of adoption of the plan. No power to extend (s113(4))
- Most challenges on adoption but there are examples of pre-adoption challenges eg:
 - Manydown Company Limited v Basingstoke & Deane Borough Council [2012] EWHC 977 (Admin)
 - R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council [2010] EWHC 535 (Admin)

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Remedy

- Wide powers of High Court s.113(7)-(7B): can quash whole or part of relevant plan document or direct action concerning preparation, publication or adoption.
- See Woodfield and JJ Gallagher Ltd v Cherwell DC [2016] 1 WLR 5126 Lindblom LJ [29]-[33] on the breadth and flexibility of the powers.

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Challenges to Local Plans

1. Substantive
2. Procedural



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1. Strategic Environmental Assessment

a. Reasonable alternatives

- Save Historic Newmarket [2011] JPL 1233 at [40]
- Heard [2012] Env 23 at [67] and [71]
- HS2 [2013] EWHC 481 at [162], [165] and [169]; [2013] PTSR 1194 at [72] and [183]-[185]
- DB Schenker [2013] EWHC 2865 (Admin) at [68]-[70]
- West Kensington Estates [2013] EWHC 2834
- FoE [2015] EWHC 776 (Admin) at [88]
- Holiday Extras [2016] EWHC 3247 (Admin) at [32]

b. Timing and curing defects

- Seaport [2008] Env LR 23 at [47] and [49]
- Cogent [2012] EWHC 2542 (Admin);
- No Adastral [2015] Env LR 28 at [57]-[59]



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2. Habitats Regulations

a. Content

- People over Wind Case C-323/17

b. “Safeguarding” provisions providing for future assessment

- Feeney [2011] EWHC 2699 (Admin) at [88]-[93]
- Cairngorms Campaign [2013] CSIH 65 at [47]-[49] and [61]
- Abbotskerswell [2014] EWHC 4166 at [65]-[67]
- Forest of Dean [2013] EWHC 1567 (Admin) at [37]-[47]

c. Cumulative effects

- Wealden [2017] EWHC 351 (Admin)

d. Timing of objections

- Boggis [2009] EWCA Civ 1061;
- Newry [2015] NIQB 65 at [76]

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3. Soundness difficult to challenge

- PA2011 s. 10(60(b): independent examination = whether DPD “sound”
- “Soundness” not statutorily defined. No presumption of soundness: Capel Parish Council v Surrey CC [2009] EWHC 350
- **Approach to Reports**
 - To be read fairly as whole, without excessive legalism: Gladman Developments Ltd [2015] EWHC 444;
 - Need only deal with principal controversial issues: KGL (Estates) Ltd [2013] EWHC 3744
- **Planning Judgment:** Testing soundness not a task for the court....The court's jurisdiction...is limited to review on traditional public law grounds: Persimmon Homes [2008] EWCA Civ 861 at [8]

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Examples of non-SEA/HR successful challenges

a. Failure to understand/address evidence

- Linden Homes v. Bromley LBC [2011] EWHC 3430: evidence that LP not financially viable made it impossible to understand Ins' conclusions that it was sound
- University of Bristol v. North Somerset Council [2013] EWHC 231: Ins misunderstood evidence of objector at EIP – and reasons did not disclose why council figures allowed for latent housing demand having regard to differing assessments

b. Failure to take policy into account

- PA 2011 s. 8(5): in preparing plan strategy, council “must take account of” RDS; council's current community plan; any policy or advice in Department guidance; and other matters it prescribes/directs
- Blyth Valley BC v. Persimmon Homes [2008] EWHC 1258 (Admin): adoption based on failure to consider economic viability of an affordable housing target, as required by new planning policy guidance

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4. Procedural Challenges

a. Consultation

- i. Including site at examination stage without consultation R (Barrow BC) v. Cumbria CC [2011] EWHC 2051
- ii. Effective consultation? Kendall v. Rochford DC [2014] EWHC 3866. Held: LPA reliance on website only not effective consultation [93]-[94]; but relief refused because plan-making process as a whole gave public sufficient opportunity to response [120]

NB Not every change requires reconsultation: Performance Retail Ltd v Eastbourne BC [2014] EWHC 102 at [47], [51]: modification which makes no substantive difference to policy does not have to be subject of SA and consultation

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b. Reasons

- Dylon 2 Ltd v Bromley LBC [2019] EWHC 2366 (Admin)
- Issue: to what extent does Ins have to give reasons for departing from planning appeal decision
- Ouseley [57] on difference between the role of Examination Inspectors and Appeal Inspectors. At EiP Inspector is “*performing an inquisitorial role*” ... “*giving reasons dealing with the principal points of controversy”*”
- Any reasons challenge to LP should reflect that. Means identifying key issues for a potential reasons challenge early on and obtaining recognition from Ins at EiP that the matter is/not a key point



Future areas of challenge?

- S19(1A) PCPA requires LPs include “*policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change.*”
- Future challenges on sustainability grounds e.g. poor public transport, remote site allocations.
- Client Earth letter to councils preparing/reviewing LPs, threatening legal action if strategies do not include “*evidence-based carbon reduction targets*”



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Conclusions

- SEA, Habs Regs and procedural requirements inc consultation, duty to cooperate, remain main candidates for challenge
- Be alive to range of other issues that may arise eg PSED, climate challenges
- Risk of no ultimate success



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